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In The

Supreme Court of the United States

October Term, 1998

JAN P. JUMONVILLE, WIFE OF/AND
PLACIDE J. JUMONVILLE

Petitioners

v.

CITY OF KENNER

Respondent

On Petition For Writ Of Certiorari

To The Fifth Circuit Court of Appeals and
the Supreme Court of Louisiana

PETITION for WRITS OF CERTIORARI

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QUESTIONS PRESENTED

This action arises under petitioners' inalienable right to peaceably possess and build his home. These fundamental property rights are guaranteed to each and every citizen under the Louisiana State Constitution and the Constitution of the United States, under the 14th Amendment, due process and equal protection. The record and judgments in the lower court confirm that the respondent, city governmental body, used its power, might and unlimited funds to crush petitioners by an invalid exercise of police power which continues to infringe arbitrarily, oppressively and unreasonably upon petitioners' private property rights abridging use. Such decisions create an intolerable government who can step beyond the words of the laws to legislate as they deem fit.

The question presented is whether the action by the lower courts violated an elemental principle of due process values that "an enactment is void for vagueness if its prohibitions are not clearly defined" by interpreting the city's ordinance, building code and regulations to order deadlines for completion of work on petitioners' home.

Further question presented is whether the courts below erroneously violated petitioners' rights to the use and peaceable possession of their home under the Louisiana State Constitution and United States Constitution, under the 14th Amendment in violation of due process and equal protection, using an invalid exercise of police power to do so.

Further question presented is whether the lower courts erred in not addressing the constitutionality of La.R.S.13:4611 or remanding the issue for contradictory hearing in the lower court.

Further question is whether petitioners waived their State and Federal Constitutional rights in the lower courts reading beyond the four corners of a consent judgment and whether there was a valid consent judgment between the respondent and petitioners because of unilateral error.

Further question is whether the lower courts

erred in not affording petitioners their constitutional protection applicable in a civil contempt proceeding criminal in nature and whether the lower courts decisions were manifestly erroneous or clearly wrong in finding petitioners were in contempt for wilful noncompliance with its orders, and therefore, should be force to pay the harsh and extreme fines of almost $ 10,000.00 or be imprisoned.

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CITY OF KENNER

Respondent

V.

JAN P. JUMONVILLE, WIFE OF/AND
PLACIDE J. JUMONVILLE

Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS AND THE SUPREME COURT FOR THE STATE OF LOUISIANA

Jan P. Jumonville and Placide J. Jumonville, petition for a writ of certiorari to review the judgments of the Supreme Court of Louisiana rendered in this proceeding on January 30, 1998, the judgment and opinions rendered on August 27, 1997 of the 5th Circuit Court of Appeals, State of Louisiana, and the judgment and opinion of the 24th Judicial District Court for the Parish of Jefferson.

OPINIONS BELOW

The amended opinion of the District Court is unreported and is reproduced in the Appendix. The opinion of the Fifth Circuit Court of Appeals is reported at 701 So.2d 223 and is reproduced in the Appendix. The Supreme Court of Louisiana's denial of petitioners' application for writs of certiorari, prohibition and/or mandamus is unreported and is reproduced in the Appendix A.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1997 and the denial of writs of certiorari, prohibition and mandamus to the Supreme Court of Louisiana was denied on January 30, 1998. This Court has jurisdiction over this matter pursuant to 28 U.S.C.A. 1257le 7, Sections 2 and 28 U.S.C. 2403(b) may apply.

STATUTORY PROVISION INVOLVED

This case involves application of the following language:

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. **U. S. Constitution, Amendment V.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. **U. S. Constitution, Amendment XIV, Section 1:**

No person shall be deprived of life, liberty or property, except by due process of law. **La. Const. Art. 1 Sect. 2.**

Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy and dispose of it within the limits and under the conditions established by law. **Louisiana Civil Code Article 477.**

STATEMENT OF THE CASE

On August 6, 1993, the City of Kenner (hereafter the "City") issued a building permit to Mr. Placide J. Jumonville, a home owner, for

interior and exterior renovation work to his home at 50 Granada, Kenner, LA. In order to financially afford the scope and quality of renovations he desired for his home, Mr. Jumonville worked with and directed all renovation work. This work on his home, far above the Building Code and standards of the City, continues on a daily basis except for normal delays due to weather, illness, material acquisition and turnover of workers.

In order to coerce the Jumonvilles into rushing the completion of their home, on April 18, 1995, the City filed a Petition for Preliminary and Permanent Injunction, in direct violation of La.C.C.P. Article 863, falsely alleging numerous violations of the City's Ordinance 1427, and specifically Section 5-84, for allegedly not "prosecuting" the renovations in accordance with the building permit issued to them, and seeking to enjoin the Jumonvilles from further alleged violations and to compel them to complete their renovations under arbitrary deadlines.

From the issuance of the original building permit in August 1993 up to the date of the filing of this Writ to the United States Supreme Court, no citation for any Code or Building violation has ever been issued by the City to the Jumonvilles nor has any evidence ever been presented in the district court proceedings to support their false allegations of building code violations or failure to continuously renovate their home.

The Jumonvilles filed an Exception, Answer, Reconventional Demand and Third Party Demand, denying the allegations of the City and alleging the following:

"(1) The City performed no inspections on the property, which was locked and inaccessible, to appraise its safety;
(2) The City repeatedly advised the Jumonvilles the construction work at 50 Granada far exceeded the Code requirements of the City;
(3) The City singled out the Jumonvilles because of complaints by Councilwoman Jeannie Black and/or other politicians, who have used their political position to harass defendants during

the course of this custom construction to satisfy their constituents and because they want the construction completed on a completely arbitrary time schedule;

4) The City engaged in selective enforcement of its ordinances by allowing and condoning numerous violation to exist by property owners in the same location without citation or warning;

(5) The City did not respond to the Jumonvilles' request to amicably resolve their allegations, only demanding a date for completion of construction work rather than defining the vague allegations in their correspondence;

(6) The City violated the **rights of the Jumonvilles to use and control their private property, a civil right granted under the provisions of Article 1, Section 4 of the Louisiana Constitution of 1974.**

(7) The City is in violation of C.C.P. Article 863 in that the petition is interposed for an improper purpose to satisfy political persons and their constituents, is not well grounded in fact and no reasonable inquiry or inspection has been made.

(8) The **City acted under official policy and custom, with gross negligence and/or deliberate indifference to the constitutional rights of the Jumonvilles**, by failing to properly investigate and inspect the property, failing to properly and adequately train and supervise their Code enforcement personnel in the inspection of the Code of ordinances building regulations.

(9) The Jumonvilles alleged they were entitled to all reasonable expenses and attorney's fees under C.C.P. Article 863, C.C.P. Article 3608 and 42 USC Section 1988."

Even though the City admitted that they had no law requiring the Jumonvilles to complete the renovation work by a deadline, in order to stop the harassment, coercion and duress by the City and because of the extended cost in personal time to the Jumonvilles, the cost in business time to Jan Jumonville and her law partner, Patrick Lee, away from their practice, the additional court cost and protracted litigation with a government body who has

unlimited resources, **(and now have used taxpayers money to pay over $ 92,000 in attorneys' fees as of June 1997)** and no court cost, the Jumonvilles signed a Consent Judgment agreeing to complete the renovation work by certain dates based on Mr. Jumonville's belief that he could complete the agreed upon renovation within the deadlines established by the City. Although Mr. Jumonville had the physical and engineering capabilities to build, he had absolutely no experience as a "professional contractor" and therefore no knowledge that the time frames he agreed to were impossible. Further, at the time of the signing of the Consent Judgment, he did not know nor could he have known of the hidden defects in the structural integrity of his home, nor of the myriad problems he would encounter hiring labor and acquiring materials. Therefore, on February 26, 1996, he *entered into a consent agreement in good faith, but with absolutely no understanding that it was impossible to accomplish.*

On February 23, 1996, the Judge signed this Consent Judgment, which document itself supports Mr. Jumonville lack of understanding, since it provides no additional time for weather, availability of material nor turnover of workers. The City, with superior knowledge of the construction business through its experts and Building Permit and Code Enforcement personnel, was familiar with such problems and knew the Consent Judgment specifically lacked these provisions, all as evidenced in the transcript in the record, by the cross-examination of Mr. Jumonville by the City's attorney, James Maxwell, at the trial in October 1996. This Consent Judgment, totally one sided, provided nothing in return to the Jumonvilles from the City other than to issue future permits already required to be issued by law. This consent judgment did not end this litigation nor did it dismiss or even address the Jumonvilles' Reconventional Demand and Third Party Demand which were never set for hearing. The order for hearing specifically only set the City's Petition for Injunction for trial on the merits. Still pending before the court is the Jumonvilles' Reconventional Demand and Third Party Demand which have never been heard, decided nor settled.

As the transcript of the hearing on October 1997 confirms, although construction has been continuous on a daily basis to date, Mr. Jumonville contended with numerous construction problems he was unaware were common in this line of work, including the discovery of hidden structural problems in May 1996, and the realization of the time required for the quality of construction he desired.

Through excavation of the garage slab in May 1996, the Jumonvilles found no pilings under the monolithic slab (one contiguous slab for the house, patio and garage) and in June 1996, Mr. Jumonville contacted Dr. Neil Hall, a structural engineer, who recommended "reinforcement of the slab at the locations noted above is highly advised." Dr. Hall further stated that "at the time of our inspection on July 1, 1996, the framing system, pilings, sheathing and roof decking for the residence was in place, and work *was* ongoing on a daily basis; ***however, work should not proceed without the advice of a professional engineer or a licensed foundation contractor.***"

The uncontradicted testimony of **Mr. Roy Carubba**, an **Expert in Structural Engineering**, at trailn October 17, 1996 was he found obvious subsidence of soil around the monolithically poured slab, noted two pilings offset from the house perimeter and another two offset on the side which could inhibit the slab and reduce the overall load carrying capacity of the slab. He was unable to find pilings under the garage or patio, a situation which could cause some damage or settlement failure to the main portion of the house. The lack of pilings could affect the overall structural integrity of the house and it would be a very prudent thing to drive additional pilings to ensure structural integrity of this particular residence.

Mr. Carubba pointed out a well known condition in Louisiana, "...in South Louisiana, it rains every day during the summer. (II:284). "If it rains every day, you can't do any work".(II:285). He explained construction can be completed within a certain time frame... **"if it doesn't rain every day and you have people show up every day and all the other problems that can go wrong in construction..."** (II:285).

Dr. Neil Hall's opinion agreed with Mr. Carubba: **These conditions would have remained undiscovered except for the physical excavation of the soil during the present course of construction. This could not have been surmised during the planning phase of the project since the surface of the concrete slab, except for a few hairline curing cracks due to age show no indication of distress."**

"Work should not proceed without the advise of a professional engineer or a licensed foundation contractor." (II:294-295).

As a result of these opinions, Mr. Jumonville filed an application for a piling permit with the City who never responded or approved same.

Mr. Carubba testified that if the pilings were not driven, he *could not guarantee the structural integrity of this residence* given the added weight which was going to be placed on the foundation. He absolutely confirmed that the pilings should be driven prior to the installation of the exterior brick veneer, the windows and the roof. If done otherwise, Mr. Carubba advised Mr. Jumonville would be risking damage to the exterior of his home and the safety of himself and his workers.

In light of the serious and compelling recommendations by structural engineers, Mr. Jumonville continued renovation work except for that which would jeopardize the structural integrity of his home.

When it became apparent to Mr. Jumonville that he could not possibly comply with the arbitrary deadlines set forth in the Consent Judgment, on August 9, 1996, the Jumonvilles filed a Motion to Modify Judgment, requesting the Judge to amend the Consent Judgment previously rendered in this matter and grant them additional time to investigate and effect repairs as recommended. Instead of either approving or disapproving the piling permit, on August 20, 1996, the City filed a Memorandum in Opposition, and their own Motion to Modify Consent Judgment, asking the court to hold the Jumonvilles in contempt and fine them $ 1000 a week until their home was completed.

On September 3, 1996, the City filed their 1st Rule for Contempt, again asking the judge to hold the Jumonvilles in contempt, fine them, but even more ***egregious, cast them into prison***.

Unable to proceed forward without a piling permit from the City, on October 3, 1996, the Jumonvilles filed a Rule for Contempt and Memorandum against the City seeking to compel issuance of the permit.

The Motions to Modify the Consent Judgment and Motions for Contempt proceeded to **trial on October 4, 1996**. Mr. Jumonville testified to the fact that he was not a contractor, and had no knowledge of the delays in dealing with merchants, carpenters and laborers necessary to complete the work, install the windows and doors and other various aspects of the work. Through his inexperience, he explained he had underestimated the time required to complete the work and did not consider weather or construction delays when he agreed to the Consent Judgment.

Following Mr. Jumonville's testimony, **trial was continued to October 17, 1996**. Eight days before October 17, 1997, **after** Mr. Jumonville's testimony on October 4, 1996, that the City had still not approved or disapproved a piling permit, and **two (2) months after** the application for a piling permit, the City engineer finally drafted a letter to Mr. Jumonville advising him for the **first** time he required plans from an architect or engineer to approve the permit.

On October 17, 1996, Mr. Jumonville's architect, Peter Waring, and structural engineer, Mr. Roy Carubba, testified to the work completed and the problems which supported the Jumonvilles' inability to comply with the Consent Judgment. This testimony is contained in the transcript in the record. Following their testimony, the Jumonvilles rested their case. Then, the City, <u>without calling one witness to prove their numerous allegations or contradict the evidence presented by the Jumonvilles</u>, rested.

At the trial, the Jumonvilles specifically **proved** they made a unilateral error as to a fact

that was a principle cause of the Consent Judgment, i.e., an unknown structural defect in the foundation which made the deadlines impossible.

At the trial, the *City specifically* ***failed to prove***:

1. The Jumonvilles knew or should have known of the hidden defects and construction problems which prevented them from complying with the consent judgment;
2. The Jumonvilles had ample time to complete the work;
3. The work had not been ongoing during the period since the permit was granted;
4. The Code in effect when the permit was issued provided that the construction must be completed by a date certain, which it does not;
5. One unsafe condition or violation of the building code ever existed, which it did not;
6. Any nuisance whatsoever;
7. Any offense or manifest evil;
8. Any injurious affects to public health, safety, morals and general welfare;

and *most importantly the City failed to prove:*

9. ***The Jumonvilles intentionally, knowingly and purposely disobeyed without justification the Consent Judgment, which they did not.***

After the parties rested on October 17, 1996, the Judge orally rendered judgment, finding the Jumonvilles in contempt, ordering them to pay the City $ 1000.00, even though the City proved no damages, along with all cost, and ordering a revised schedule of work to be completed by the Jumonvilles. In further violation of the constitutional rights of the Jumonvilles, the Court held that if the Jumonvilles did not comply with this illegal judgment, the court would hold them in further contempt and fine them from $ 50 to $ 200 per work day.

Judgment was signed on October 18, 1996 and amended on October 23, 1996. The judgment of October 23, 1996 granted the City of Kenner's Petition for Injunction, *an order with no basis*

whatsoever in law, and with no law ever cited by the City or the Court to support the imposition of arbitrary deadlines to complete construction, all in violation of the constitutional rights of the Jumonvilles.

On November 5, 1996, the Jumonvilles filed a Petition for Suspensive and/or Devolutive Appeal and Order to the October 18 & 23, 1996 judgments, and were granted a Devolutive Appeal with Bond.

The issues raised on appeal # 97 CA 125 were:

"1. Do the judgments of October 18 and 23, 1996 violate the Jumonvilles' constitutional rights guaranteed under the Louisiana Constitution and Constitution of the United States, under the 14th Amendment and violate due process and equal protection under the laws of the State and the United States?

2. Are the deadlines set for completion of renovation in the judgments of October 18 and 23, 1996 a valid exercise of police power in that it prevents some offense or manifest evil or preserves the public health, safety, morals, or general welfare?

3. Are the deadlines in the judgments of October 18 and 23, 1996 reasonably adapted to a public end not arbitrary, oppressive or unreasonable?

4. Are the judgments of October 18 and 23, 1996 in degradation of the Jumonvilles' constitutional right to peaceable possession of their property?

5. Is an ordinance that purports to vest arbitrary discretion without describing any definite rule for guidance unconstitutional?

6. Did the Jumonvilles knowingly and purposely, without justifiable excuse, disobey the Consent Judgment?

7. Is the City in contempt for failure to approve or disapprove the piling permit and in violation of Article 863 so that they should be fined attorney fees and all cost?"

On December 30, 1996, the City filed yet another Rule for Contempt of Court, again alleging that the Jumonvilles had not complied with arbitrary deadlines set forth by the Court in its October 23, 1996 judgment, and seeking additional fines, penalties, attorney fees and cost to be imposed on the Jumonvilles. This matter was set for hearing on Tuesday, January 21, 1997.

Even though the appeal was pending on the Judgments of October 18 and 23, 1996, the Jumonvilles were forced to yet another trial on the same issues and on January 23, 1997, the Judge *again* held the Jumonvilles in contempt for being unable to complete the renovations.

In conjunction therewith, the Jumonvilles filed a Petition for Writs of Certiorari, Prohibition and Mandamus on February 28, 1997 to the Judgment of January 23, 1997.

The issues raised on writ #97 C 210 were:

"1. Do the judgments of October 18 and 23, 1996 and January 23, 1997 violate the Jumonvilles' constitutional rights guaranteed under the Louisiana Constitution and Constitution of the United States, under the 14th Amendment and violate due process and equal protection under the laws of the State and the United States and in degradation of the Jumonvilles' peaceable possession of their property?"

Again, despite the two pending appeals of the judgments of October 23, 1996 and January 23, 1997, on March 17, 1997, the City of Kenner filed a 3rd Motion for Contempt based on the same prior allegations, asking the Court to hold the Jumonvilles in contempt and ***"be imprisoned"*** for failure to comply with the Judgments of October 23, 1996 and January 23, 1997.

On May 23, 1997, the Jumonvilles were forced to defend a third Motion for contempt for the same

allegations. A judgment on the Motion was signed June 16, 1997, finding the Jumonvilles in contempt of the Consent Judgment of February 22, 1996, and also in contempt of the court's orders of October 23, 1996, and January 23, 1997, and ordering the Jumonvilles to pay a fine of $ 9050.00 by 1:30 p.m. on June 20, 1997, in excess of the maximum fines allowed under La.R.S. 13:4611 or they would be imprisoned.

On June 20, 1997, the Jumonvilles filed a Petition for Writs of Certiorari, Prohibition and Mandamus with a motion for a stay of the above judgments.

The issues addressed on writ # 97 C 602 were:

"1. In La. R.S. 13:4611 unconstitutional?

2. Did the district judge abuse her discretion in ordering the payment of $ 9050.00 in excess of the maximum fines under La.R.S. 13:4611(1)(d) and the imprisonment of the Jumonvilles for failure to pay the excessive fine?"

On June 20, 1997, the Fifth Circuit granted a stay of all proceedings, granted the above writ and consolidated all writs and appeals.

Following the briefs filed and oral argument, the Fifth Circuit denied relief as to the issues raised on the Writ and affirmed all judgments on appeal except to reduce the fines by $ 500.00 and awarded all fines to the district court as opposed to the City of Kenner.

On September 10, 1997, the Jumonvilles filed an Application for Rehearing. The rehearing issues were:

"1. The Court should consider the Exhibits referred to and attached to the Jumonvilles' brief as the originals were entered into evidence and lodged with the Court in these consolidated proceedings.

2. This court should allow the record to be supplemented with the pleadings filed and the

transcripts of the hearings subsequent to October 1996.

3. The constitutional issues raised by the Jumonvilles are properly before the court; alternatively, these issues should be remanded.

On October 17, 1997, the Fifth Circuit refused Rehearing without reasons.

On November 18, 1997, the Jumonvilles files a Petition for Writs of Certiorari, Prohibition and Mandamus with the Supreme Court of Louisiana.

The issues and errors raised on writ # 97 CC 2890 were:

"1. The court erred in finding a valid consent judgment between the City of Kenner and the Jumonvilles because the Jumonvilles made a unilateral error as to a fact which was the principle cause for making the contract and the City of Kenner knew it was the principle cause.

2. The court erred in finding the Jumonvilles waived their state and federal constitutional rights and reading beyond the four corners of the consent judgment.

3. The Fifth Circuit erred in sanctioning an invalid exercise of police power which infringes arbitrarily, oppressively and unreasonably upon private property rights abridging use, and which exercise does not prevent some offense or manifest evil or the preservation of the public health, safety, morals, or general welfare.

4. The Fifth Circuit erred in violating an elemental principle of due process values that "an enactment is void for vagueness if its prohibitions are not clearly defined" when the court interpreted the City of Kenner's ordinance, building code and regulations to order deadlines for completion of work by the Jumonvilles.

5. The Fifth Circuit erred in sanctioning the denial of the Jumonvilles' constitutional rights guaranteed under the Louisiana constitution and constitution of the United States, under the 14th amendment in violation of due process and equal protection under the laws of the state and the united states and denied the Jumonvilles' peaceable possession of their property.

6. The Fifth Circuit erred in review of whether their was wilful noncompliance to find contempt when the fifth circuit departed from the jurisprudence by failing to apply the standard of manifest error or clearly wrong to the district court and where the overwhelming testimony and evidence was uncontradicted.

7. The appellate court erred in not addressing the constitutionality of LA.R.S.13:4611 or remanding the issue for contradictory hearing in the lower court.

8. The court erred in not affording the Jumonvilles there constitutional protection applicable in a civil contempt proceeding criminal in nature.

9. The appellate court erred in ordering the Jumonvilles to pay a fine of $ 500.00 to the district court and $ 9050.00 for three findings of contempt or imprisonment."

On January 30, 1998, the Supreme Court of Louisiana denied writs.

REASONS FOR GRANTING A WRIT

The Louisiana State Fifth Circuit Court of Appeals has decided important question of law in a way that conflicts with the decisions of the United States Supreme Court bearing on elemental principle of due process values and the use and peaceable possession of their home under the United States Constitution, under the 14th Amendment in violation of due process and equal protection and using an invalid exercise of police power to do so. Further the state courts erred in not addressing the

constitutionality of La.R.S.13:4611 or remanding the issue for contradictory hearing in the lower court and further denied petitioners' Federal Constitutional rights in the lower courts reading beyond the four corners of a consent judgment and in not affording petitioners their constitutional protection applicable in a civil contempt proceeding criminal in nature.

I. THERE WAS NO VALID CONSENT JUDGMENT BETWEEN THE CITY OF KENNER AND THE JUMONVILLES BECAUSE THE JUMONVILLES MADE A UNILATERAL ERROR AS TO A FACT WHICH WAS THE PRINCIPLE CAUSE FOR MAKING THE CONTRACT AND THE CITY OF KENNER KNEW IT WAS THE PRINCIPLE CAUSE.

The City of Kenner strenuously and vehemently argued the validity of the Consent Judgment as a bilateral contract between the parties. They mistakenly argued, and the Fifth Circuit ignored the law that a contract may be invalidated by unilateral error of one of the parties. It is well settled in Louisiana law that consent to a judgment or contract may be vitiated by an error of fact and that without consent there is no contract. LSA-R.C.C. Articles 1819, 1890, 1923(1870).

Article 1821(1870) states:

" That is called error of fact, which proceeds either from *ignorance of that which really exists, or from a mistaken belief in the existence of that which has none.*"

Article 1948 states:

"Consent may be vitiated by error, fraud or duress.

Article 1949 states:

"Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party."

Article 1950 states:

"Error may concern a cause when it bears on the nature of the contract, or the thing that is the contractual object or a substantial quality of that thing, ... or any other circumstances that the parties regarded or should in good faith regarded,

as a cause of the obligation."

The undisputed evidence is that the principle cause of the Consent Judgment was the City of Kenner's desire to have the house renovations completed by certain dates. However, at the time of entering the Consent Judgment, Mr. Jumonville was completely unaware of the hidden defects affecting the structural integrity of the slab. This constituted a unilateral error as to a fact, i.e., there were no structural defects in the house. This error specifically affected the time frame within which Mr. Jumonville agreed to complete portions of the residence, i.e., the principle cause for making the contract. Therefore, the Consent Judgment, and any judgments flowing therefrom, are invalid.

The Fifth Circuit relied heavily on Martin Forest Products v. Grantadams, 616 So.2d 251(La. App. 2 Cir. 1993),a case completely distinguishable.

In the present case, the primary motive was completion of the renovations by certain dates. Petitioners never stipulated their property was a nuisance, or the City was entitled to an injunction, or waived their state and federal constitutional rights. Mr.Jumonville had no building, architectural or engineering expert advise him that he could complete the renovations by the proscribed dates. Further, unlike Martin, after an engineering expert advised Mr. Jumonville of the dangers of continuing the renovations under the proscribed schedule, he sought piling permits from the City to insure the structural integrity of his home and the safety of his neighbors. The Jumonvilles brought two experts whose uncontradicted testimony supported Mr. Jumonville's testimony he made an error of fact in agreeing to the Consent Judgment. Mr. Jumonville has repeatedly testified that he intends to complete his home and the evidence presented proves that work continues on a daily, full time basis.

II. THE JUMONVILLES DID NOT WAIVE THEIR STATE AND FEDERAL CONSTITUTIONAL RIGHTS IN THE CONSENT JUDGMENT.

La. C.C. Article 2046 states:

When the words of a contract are clear and explicit and lead to no absurd consequences, *no further interpretation may be made in search of the parties' intent.*

Under this Article, when a clause of a contract is clear and unambiguous, the letter of that clause *should not be disregarded under pretext of pursing its spirit.* Maloney v. Oak Builders, Inc., 256 La. 85, 235 So.2d 386(1970)

The Consent Judgment is clear and unambiguous and should be read within its four corners. It agrees to the completion of portions of the construction work and only that. The Jumonvilles did not admit any allegations of the City of Kenner's Petition nor did they dismiss their claims, Answer, Reconventional Demand and Third Party Demand. The Consent Judgment does not stipulate that the Jumonvilles' actions were a nuisance, that the City of Kenner was entitled to an injunction, that the City is entitled to damages, or that the Jumonvilles waived their State and Federal Constitutional Rights. The Jumonville only agreed to complete work by certain dates. There are no words susceptible to a different meaning.

To broaden the Consent Judgment to deny the Jumonvilles' State and Federal Constitutional rights is clearly wrong. Our Constitution provides that the only legitimate end of government is to secure justice to all, with the courts open to persons injured in his property who shall have remedy by due process of law. No person shall be deprived of life, liberty or *property, except by due process of law.* La. Const. Art. 1 Sect. 2.

III. THE FIFTH CIRCUIT ERRED IN SANCTIONING AN INVALID EXERCISE OF POLICE POWER WHICH INFRINGES ARBITRARILY, OPPRESSIVELY AND UNREASONABLY UPON PRIVATE PROPERTY RIGHTS ABRIDGING USE, AND WHICH EXERCISE DOES NOT PREVENT SOME OFFENSE OR MANIFEST EVIL OR THE PRESERVATION OF THE PUBLIC HEALTH, SAFETY, MORALS, OR GENERAL WELFARE.

In the case of City of New Orleans v. Southern Auto Wreckers, 192 So. 523(La. 1939),the president of a junk yard company was prosecuted for failure to

build and maintain a fence as specifically set forth by City Ordinance, convicted and fined with order of imprisonment for failure to pay the fine. The president, incarcerated, appealed to the Supreme Court. Finding the ordinance unconstitutional, the conviction and sentence were set aside and the president released.

The Supreme Court cited the general rule which prevails here and elsewhere as stated in C.J., Section 228, page 227:

" In order that a municipal regulation may be sustained as an exercise of the police power, the regulations must ***have for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals, or general welfare***. The exercise of the police power must have a substantial basis. The power can not be made a mere pretext for legislation that does not fall within it. There must be some clear, real, and substantial connection between the assumed purpose of the regulation and the active provisions thereof, and the provisions must in some plain, appreciable and appropriate manner tend towards the accomplishment of the object for which the power is exercised." P. 526;

The Supreme Court found the ordinance purely arbitrary and unreasonable:

" While the police power of municipalities is broad and far-reaching, it is not without limitations. In the exercise of that power, municipalities may go to the boundaries of reason but no further....But the exercise of that power for such purposes, without adequate reasons, is **a violation of the Due Process Clause of the State and Federal Constitutions**. Const. La. 1, Section 2; U.S.C.A. Const. Amend. 14.

Municipal police power may not be exercised to infringe arbitrarily or unreasonably upon personal or private property rights.

In speaking of the rights of individuals to use their private property as they see fit, as long as their use of it is not offensive or dangerous, it is

stated in American Jurisprudence, Volume 11, Sec. 279, p. 1037:

' ***Nevertheless, the owner has a right to erect such structures or to use the property for such legitimate purposes as he sees fit, utilizing such portions of it as he pleases, as long as in so doing he in no manner injuriously affects the public health, safety, morals, and general welfare.*** Any law abridging rights to a use of property, which right does not infringe the rights of others, or limiting the use of property beyond what is necessary to provide for the welfare and general security of the public is not a valid exercise of the police power.' " P. 527.

Louisiana courts have continued to hold municipalities to this standard City of Lafayette v. Butcher Air Conditioning, 392 So.2d 759 (La. App. 3 Cir. 1980); Hi-Lo Oil Company v. City of Crowley, 274 So.2d 757, 762(La. App. 3 Cir. 1973).

Any ordinance or law which imposes restrictions upon the use of private property should be strictly construed. City of Baton Rouge v. Allen, 106 So. 740(La. App. 1 Cir. 1958).

The federal and state governments are prohibited from depriving a person of life, liberty or property without due process of law. U.S. Const. Amends. V, XIV; La. Const. art. 1, Sec. 3(1974). " The test of whether an ordinance is a constitutionally valid exercise of police power depends on whether under all the circumstances, the regulation is reasonable and whether it is designed to accomplish a purpose properly falling within the scope of the police power." Wes-T-Erre Dev v. Parish of Terrebonne, Etc., 416 So.2d 209(La. App. 1 Cir.), writ denied, 421 So.2d 251(La. 1982). " If the reasons are not adequate, such legislation ***violates the due process clauses of the Constitutions.***" Board of Examiners of Louisiana v. Parker, 190 La. 214, 182 So. 485(1938) and Hi-Lo Oil, supra. P. 761. The means adopted by an ordinance must be reasonably adapted to a public end and must not be arbitrary, oppressive or unreasonable. City of Crowley Firemen v. City of Crowley, 264 So.2d 368(La.App.3 Cir. 1972).

In the present case there is no law whatsoever to support the imposition by the Court of a deadline to complete construction. What offense, manifest evil or preservation of the public health, safety, morals, or general welfare can the imposition of deadlines prevent in this case? There are no building code violations or safety hazards. The City of Kenner has no reasonable or rational justification to impose such a deadline to complete the Jumonville home.

As noted by the court in Apex Oil Company V. Allen, 357 So.2d 624(La. App. 1 Cir. 1978), ***it is not necessary to prove irreparable harm*** in order to obtain preliminary injunction relief when the injunction is sought on grounds that the action is reprobated by law.

IV. THE FIFTH CIRCUIT ERRED IN VIOLATING AN ELEMENTAL PRINCIPLE OF DUE PROCESS VALUES THAT "AN ENACTMENT IS VOID FOR VAGUENESS IF ITS PROHIBITIONS ARE NOT CLEARLY DEFINED" WHEN THE COURT INTERPRETED THE CITY OF KENNER'S ORDINANCE, BUILDING CODE AND REGULATIONS TO ORDER DEADLINES FOR COMPLETION OF WORK BY THE JUMONVILLES.

The City of Kenner alleged in their Petition that the Jumonvilles "violated City of Kenner's Ordinance 1427, and specifically, but not limited to Section 5-84 and Section 5-63 and specifically, but not limited to Article 305 of the City of Kenner Building Code and specifically the Kenner building regulations". Notwithstanding that the City presented no evidence whatsoever to support its allegations, ***none of these ordinances, codes and building regulations set forth deadlines for stages of construction or renovation work.***

In Duplantis v. Bonvillain, 675 F.Supp. 331(E.D. La. 1987), the Court stated:

" It is an elemental principle of due process values that 'an enactment is void for vagueness if its prohibitions are not clearly defined.' " City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289, 102 S.Ct. 1070, 1075, 71 L.Ed.2d 152 (1982) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2298, 33 L.Ed.2d 222 (1972). Central

to this thought is that people ought not have to guess about the law's meaning:

' [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'

Smith v. Goguen, 415 U.S. 566, 572 n. 8, 94 S.Ct. 1242, 1247 n.8, 39 L.Ed.2d 605 (quoting *Connally v. General Construction Company*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

The offense to due process lies in both the nature and consequences of vagueness. First, vague laws do not give individuals **fair notice of the conduct proscribed**. Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972).

Second, **such laws fuel the possibility of arbitrary and discriminatory enforcement in that they fail to limit law enforcement officials' exercise of discretion**. *Grayned*, 408 U.S. at 108-109, 92 S.Ct. at 2298-99.

Third, vague laws 'defeat the purpose of, and frustrate the essence of, a constitutional regime. ***We remain 'a government of laws, and not of men'...only so long as our laws remain clear.'*** City of Mesquite, 455 U.S. at 290 n. 12, 102 S.Ct. at 1075 n. 12 (citation omitted)."

The Jumonvilles are in an unusual position. The trial court judgments were not based on the violation of any specific ordinance whatsoever since, as noted above, there is no ordinance setting forth deadlines for construction. However, the effect of the judgments on the Jumonvilles are the same as the enforcement of an unconstitutional ordinance. Thus, this Honorable Court should be guided by the standards and principles outlined in the cases noted herein above.

The plain and simple truth of this matter is that the City of Kenner has not, and indeed CANNOT, cite any law whatsoever to support its position the

Jumonvilles must complete the renovations of their home in conformity with any arbitrary deadlines. This is because no such law exists. The City has not offered or submitted into evidence one single citation to support its allegations of Code violations or Code deadlines. This is because no such Code violations or deadlines exist. The Jumonvilles have been, and are continuing to operate under a validly issued City of Kenner building permit, with work far exceeding Code requirements and under a building code which sets forth no deadlines of any nature whatsoever for construction or renovations performed thereunder.

V. THE FIFTH CIRCUIT ERRED IN SANCTIONING THE DENIAL OF THE JUMONVILLES' CONSTITUTIONAL RIGHTS GUARANTEED UNDER THE LOUISIANA CONSTITUTION AND CONSTITUTION OF THE UNITED STATES, UNDER THE 14TH AMENDMENT IN VIOLATION OF DUE PROCESS AND EQUAL PROTECTION UNDER THE LAWS OF THE STATE AND THE UNITED STATES AND DENIED THE JUMONVILLES' PEACEABLE POSSESSION OF THEIR PROPERTY.

Article 1, Section 4 of the Louisiana Constitution of 1974 protects the right of landowners to use and control his property and its peaceable possession. La. C.C. Article 477 states:

" Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy and dispose of it within the limits and under the conditions established by law."

As Judge Redmann stated in Simmons v. Board of Zoning Adjustments for City of New Orleans, 338 So.2d 752, 753(La. App. 4 Cir. 1976):

"One has the 'right to use, to enjoy and to dispose of one's property in the most unlimited manner, provided it is not used in any way prohibited by laws or ordinances.' C.C.491.".

See also City of New Orleans v. Southern Auto Wreckers, 192 So. 523(La. 1939), in which the Supreme Court defined the right of a property owner to the legitimate use of their property as they see fit and City of Lafayette v. Butcher Air

Conditioning, 392 So.2d 759 (La. App. 3 Cir. 1980); Hi-Lo Oil Company v. City of Crowley, 274 So.2d 757, 762(La. App. 3 Cir. 1973) in which our courts have continued to hold municipalities to this standard.

Any ordinance or law which imposes restrictions upon the use of private property should be strictly construed. City of Baton Rouge v. Allen, 106 So. 740(La. App. 1 Cir. 1958).

The federal and state governments are prohibited from depriving a person of life, liberty or property without due process of law. **U.S. Const. Amends. V, XIV; La. Const. Art. 1, Sec. 3(1974).** See also Wes-T-Erre Dev v. Parish of Terrebonne, Etc., 416 So.2d 209(La. App. 1 Cir.), writ denied, 421 So.2d 251(La. 1982).

" If the reasons (for a regulation) are not adequate, such legislation ***violates the due process clauses of the Constitutions.***" Board of Examiners of Louisiana v. Parker, 190 La. 214, 182 So. 485(1938) and Hi-Lo Oil, supra. P. 761.

VI. THERE WAS NO EVIDENCE OF WILFUL, KNOWING NONCOMPLIANCE OF THE CONSENT JUDGMENT AND JUSTIFIABLE REASON FOR NONCOMPLIANCE.

The trial court held the Jumonvilles in contempt of the Consent Judgment in the judgment of October 23, 1997. How can a court hold its citizens in contempt of a judgment that is unconstitutional? Even if the judgment was constitutional, the law and our Courts have long held that a party cannot be held in contempt unless he has *wilfully disobeyed or refused to honor a direct court order.* Under the provisions of La.C.C.P. Art. 221, ***'wilful disobedience means an act or failure to act that is done "intentionally, knowingly, and purposely, without justification".*** Nelson v. Nelson, 421 So.2d 366, 368(la. App. 1 Cir. 1982); Ferry v. Ferry, 444 So.2d 797(la. App. 3 Cir. 1984).

There was no evidence whatsoever in the October, 1996 trial, which is in the record, to support any intentional, knowing or purposeful act to not complete the Jumonvilles' home. The overwhelming evidence based on the uncontradicted

testimony of Mr. Jumonville, the uncontradicted corroborating report of Dr. Neil Hall, the uncontradicted testimony of Mr. Ray Carubba, structural engineer, and the uncontradicted testimony of Mr. Peter Waring, architect, and the uncontradicted physical documents and photographs clearly show that Mr. Jumonville's inability to meet the arbitrary deadlines was wilful or intentional, and that the judge was wrong in holding the Jumonvilles in contempt. This consent judgment was clearly entered into without realization of the numerous problems contractors face when building: rain, construction problems, movement of workers and hidden structural defect. The City offered no evidence whatsoever to contradict ongoing daily work and the problems encountered by the Jumonvilles as they attempted to complete the renovations. To fine and actually threaten to imprison the Jumonvilles is an atrocity in its most insidious form. It sanctions a City's use of unlimited taxpayers' money to prosecute, without any basis in law, individual citizens without the same financial resources to defend themselves. It encourages misuse of the courts to punish its citizens when there has been no violation of the law.

VII. THE APPELLATE COURT SHOULD HAVE ADDRESSED THE CONSTITUTIONALITY OF LA.R.S.13:4611 OR REMANDED THE ISSUE FOR CONTRADICTORY HEARING IN THE LOWER COURT.

In Champagne v. Champagne, 541 So.2d 933 (La.App. 5 Cir. 1989), the Fifth Circuit stated:

"We decline to address the constitutionality of La.R.S. 13:4611(1)(d), as that issue was not raised at the trial nor was an assertion of unconstitutionality pleaded prior to the brief's filing in this Court. Lemire v. New Orleans Public Serv., 458 So.2d 1308, 1311 (La. 1984); State of La. in the Interest of J.B., 499 So.2d 611, 612 (La.App. 5th Cir. 1986), writ not considered, 503 So.2d 8 (La. 1987), reconsideration granted, writ denied, 504 So.2d 870 (La. 1987). **Although not deciding, we find La.R.S. 13:4611 (1)(d) is patently unconstitutional.**"

The Fifth Circuit specifically found that the Jumonvilles had plead the constitutional issues in

their Reconventional and Third Party Demands but declined to address whether La.R.S. 13:4611(1)(d) was unconstitutional, claiming that issue was not argued before the trial court as required by Vallo v. Gayle Oil Co., Inc, 646 So.2d 859(La. 1994). Further, the Fifth Circuit found that the Jumonvilles had waived these constitutional defenses by signing the Consent Judgment. This rationale is contradictory to that espoused by this Court in Vallo.

Therein, this Court stated: "The requirement of specially pleading the unconstitutionality of a statute in pleadings implies that this notable issue will receive a contradictory hearing wherein all parties will be afforded an opportunity to brief and argue the issue...The record of the proceeding could then be reviewed to determine whether the party attacking the statute sustained his or her burden of proof, and whether the trial court attempted to construe the statute so as to preserve its constitutionality." p.865.

Therefore, the appellate court should either have held that the Consent Judgment constituted a declaration of the constitutionality of the statute, enabling appellate courts to address that issue or, more reasonably, should have remanded this "notable issue" to the lower court for a full contradictory hearing and creation of a record for appellate review as dictated by this Court's decision in Vallo.

VIII. THE JUMONVILLES WERE NOT AFFORDED THEIR CONSTITUTIONAL PROTECTIONS APPLICABLE IN A CIVIL CONTEMPT PROCEEDING CRIMINAL IN NATURE.

In the May 23, 1997 judgment, the district court fined the Jumonvilles $ 9050.00 to be paid to the City of Kenner by June 20, 1997 or be thrown in jail. The Fifth Circuit amended the judgment to reduce the fine by $ 500.00 and ordered the fines paid to the court (instead to the City) to vindicate the authority of the court.

The trial court's primary purpose in imposing sentence determines whether contempt proceedings are civil or criminal in nature. It is considered

criminal if the purpose is to punish disobedience of a court order. State In Interest of R.J.S., 493 So.2d 1199, 1202(La. 1986); Geo-Je's Civic Ass'n, Inc. v. Reed, 525 So.2d 192(La. App. 1 Cir. 1988). A further indication of the trial court's primary purpose is where the defendant is not given an option they are able to comply with rather than going to jail. State v. Hope, 449 So.2d 633(La. App. 1 Cir. 1986).

This court addressed criminal contempt in a civil proceeding in Champagne v. Champagne, 541 So.2d 933(1a. App. 5 Cir. 1989), citing the United States Supreme Court case of Feiock v. Feiock, 485 U.S. 624, 108 S.Ct. 1423, 99 L.Ed. 2d 721(1988):

"But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441, 31 S.Ct 492, 498, 55 L.Ed. 797 (1911). The character of the relief imposed is thus ascertainable by applying a few straightforward rules. If the relief provided is a sentence of imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order," and is **punitive if "the sentence is limited to imprisonment for a definite period."** Id., at 442, 31 S.Ct. at 498. **If the relief provided is a fine, it is ...punitive when it is paid to the court**, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order. **These distinctions lead up to the fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt**. See, e.g., Gompers, supra, at 444, 31 S.Ct., at 499; Michaelson v. United States ex rel. Chicago, St. P., M. & O.R. Co., 266 U.S. 42, 66, 45 S.Ct. 18, 20, 69 L.Ed. 162 (1924)."

Further, in Feiock v. Feiock, supra, a court's imposition of a determinate sentence in a civil contempt hearing must include a purge clause. The Court clearly indicated that when it spoke of a

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imprisonment for not more than twelve months or both;

d) For any other contempt of court...by a fine of ***not more than five hundred dollars,*** *or imprisonment for not more than three months, or both."*

The trial court's fine is based on three findings of contempt, all for failure to complete work as set forth in the Consent Judgment, by her judgments of October 23, 1996, January 21, 1997 and June 16, 1997. R.S. 13:4611(1)(b) is inapplicable since the Jumonvilles have not disobeyed a lawful restraining order, or preliminary or permanent injunction.

The only applicable fines for contempt are found in La.R.S. 13:4611(1)(d) which provide for a fine of not more than five hundred dollars. Therefore, the maximum fine is five hundred dollars, since the finding of contempt arises out of the original order of October 23, 1996. All subsequent findings of contempt are based on the original judgment and even reference it as does the June 16, 1997 judgment. Alternatively, the court has found the Jumonvilles in contempt on three separate hearings. Even under this interpretation, the maximum fine is One Thousand Five Hundred, not Nine Thousand Fifty dollars.

CONCLUSION

This Court should set aside the Consent Judgment, the judgments of October 18 and 23, 1996 and all subsequent judgments that flow from the original judgments ordering deadlines and holding the Jumonvilles in contempt based on the undisputed fact that the consent judgment is invalid for a unilateral error by the Jumonvilles which was the principle cause for the Consent Judgment. The deadlines ordered by the court are unsupported by law or jurisprudence, are unconstitutional, usurp and violate the property rights guaranteed under the Constitution of Louisiana and the United States of America under the 14th Amendment, are in violation of due process and equal protection under the laws of the State and the United States and are in degradation of the Jumonvilles' peaceable possession

of their property.

The judgments serve no legitimate purpose that protects the general health, welfare and morals of the citizens and is arbitrary, oppressive and unreasonable.

The overwhelming and undisputed evidence and testimony in the trial of October, 1996 show that the Jumonvilles did not wilfully disobey the court's orders, did everything reasonable to comply with the arbitrary deadlines but were unable to do so based on circumstances they could not foresee, did not know about, and could not control.

This Court should reverse the order of the trial court fining the Jumonvilles $ 9050.00 because there is no reasonable basis for contempt, the fine is excessive, La.R.S. 13:4611 is unconstitutional and the Jumonvilles were not afforded their constitutional protections applicable in a civil contempt proceeding criminal in nature.

Alternatively, the fine is in excess of the maximum fine provided under La.R.S. 13:4611(1)(d) and the trial court's judgment of June 16, 1997 should be reduced to $ 500.00 since the findings of contempt all arise out of the original finding of contempt in the judgment of October 23, 1996.

Alternatively, the maximum fine should be no more than $ 1500.00 since there are only three judgments of contempt.

Respectfully submitted,

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Attorney for Defendants/Petitioners
Jan P. Jumonville and
Placide J. Jumonville

VERIFICATION

STATE OF LOUISIANA
PARISH OF JEFFERSON

Before me, the undersigned authority, personally came and appeared JAN P. JUMONVILLE who being duly sworn, deposed and said that she is the attorney for Jan P. Jumonville and Placide J. Jumonville, Defendants-Petitioners, in the above proceedings;

That she has prepared and read the said Petition and that all of the allegations contained therein are true and correct;

That copies of this Petition have been served by U.S. Mail on April 30, 1998:

Judge Jo Ellen Grant, Division "I"
24th Judicial District Court,
Parish of Jefferson,
P. O. Box 10
Gretna, LA 70054
(504) 364-3910,

Mr. Kurt C. Garcia, Attorney for Respondent /Plaintiff, the City of Kenner
Concourse Pl., Ste 125, 1940 I-10 Service Road
Kenner, LA 70065
(504) 466-1331 and

State of LA.Attorney General Richard E. Ieyoub
P. O. Box 94005
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Sworn to and subscribed before me this 30 day of April, 1998.

NOTARY PUBLIC